SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 229

ALABAMA POWER COMPANY,

v. *Petitioner,*

FEDERAL POWER COMMISSION.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The first opinion of the Court of Appeals (R. Vol II, p. 982) is officially reported as *Alabama Power Company* v. *McNinch*, 94 F. (2d) 601. Neither the second opinion of the Court of Appeals (R. Vol. II, p. 864) nor the memorandum opinion of the district court (R. Vol. II, p. 944) has been officially reported.

Jurisdiction.

Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1935, 28 U. S. C. A. 347, and Section 313 of the Fed-

eral Power Act, added by the Act of August 26, 1935, c. 687, Title II, Section 213, 49 Stat. 860, 16 U. S. C. A. Sec. 825L. The first decree of the Court of Appeals (R. Vol. II, p. 1020) was entered September 27, 1937; the second decree of the Court of Appeals was entered on March 30, 1942 (R. Vol. II, p. 893) and application for rehearing was denied April 29, 1942 (R. Vol. II, p. 910).

Statute Involved.

The statute involved is the Federal Power Act, 41 Stat. 1063, 46 Stat. 797, 49 Stat. 863 (16 U. S. C. A. 791a-825r).

Statement of the Case.

A statement of the case pertinent to the reasons relied upon for the granting of the writ is contained in the petition at pages 3 to 6, inclusive.

Specification of Errors to be Urged.

1. The Court of Appeals erred in holding that when a corporation acquires a completed licensed project, together with unlicensed utility properties, for a consideration equal to the recorded book value of such properties, the Federal Power Commission may lawfully require such corporation to write out of its general investment accounts an amount of such consideration equal to the amount thereafter disallowed by such Commission as actual legitimate original cost of the licensed project (R. Vol. II, pp. 882, 888).

2. The Court of Appeals erred in holding that the Federal Power Commission may lawfully order the write-off described in question (1) above in a proceeding for the determination of actual legitimate original cost only, and without notifying Petitioner that such action is proposed (R. Vol. II, p. 877).

3. The Court of Appeals erred in holding that the Federal Power Commission had jurisdiction to eliminate from the general investment accounts of Petitioner the amounts disallowed by the Commission as actual legitimate original cost of the project (R. Vol. II, pp. 870-77, 892).

4. The Court of Appeals erred in holding that Petitioner had been granted a hearing upon the question of whether amounts disallowed as actual legitimate original cost of the project should be eliminated entirely from the investment accounts of Petitioner (R. Vol. II, pp. 877, 890, 892).

5. The Court of Appeals erred in holding that the Federal Power Commission had authority to order the write-off described in question (1) above in the absence of a finding by the Federal Power Commission that the amounts carried in Petitioner's general investment accounts exceeded Petitioner's true investment in assets of continuing value.

6. The Court of Appeals erred in holding that Petitioner had foregone the right to insist upon a hearing on the question whether disallowed actual legitimate original cost should be eliminated from the general investment accounts of Petitioner (R. Vol. II, p. 891).

7. The Court of Appeals erred in holding that taxes paid on project lands more than three years prior to beginning of construction of project structures are not properly part of actual legitimate original cost of such project (R. Vol. II, pp. 1012-15).

8. The Court of Appeals erred in holding that interest on expenditures incurred more than three years prior to the beginning of construction of project structures was not properly part of the actual legitimate original cost of such project (R. Vol. II, pp. 1015-16).

9. The Court of Appeals erred in affirming Respondent's determination of the value of project lands and water rights

which was based solely upon the purchase price of stock of companies owning lands and water rights insufficient for development of the project (R. Vol. II, pp. 992, 1002-07, 868).

10. The Court of Appeals erred in holding that in a transaction where bonds of a purchaser were given for property, the consideration paid was the market value of such bonds rather than the principal amount thereof (R. Vol. II, p. 1004).

11. The Court of Appeals erred in affirming a holding of the Respondent that a fee or profit reasonable in amount paid to an affiliated contractor corporation for the construction of a licensed project is not allowable as actual legitimate original cost of such project (R. Vol. II, p. 1008-12).

12. The Court of Appeals erred in holding that no new corporation was formed under the laws of Alabama in the merger or consolidation of July 29, 1913 (R. Vol. II, p. 1002).

13. The Court of Appeals erred in holding that cost was not incurred in the merger or consolidation of July 29, 1913 (R. Vol. II, p. 994, 1002).

I.

Respondent's order that disallowed items be charged to petitioner's earned surplus account is void as a denial of due process of law in that petitioner was afforded no notice or hearing on the question whether the amount of such disallowed cost items should be eliminated from accounts reflecting petitioner's investment in its utility properties nor does the record reveal any finding in support of such order.

The notices given Petitioner (R. Vol. I, p. 153, 616) purported to be of a hearing for the determination of actual legitimate original cost of the project. At the hearings no

proposal was made by the Commission's staff with respect to the disposition of such items as might be disallowed and there was no testimony with respect thereto. The Commission's order, however, requires elimination of the disallowed amounts from the general investment accounts of Petitioner by charge of such amount to the earned surplus account of Petitioner[3] (R. Vol. I, pp. 19, 21).

Petitioner's position is that amounts other than actual legitimate original cost may be retained in investment accounts if such amounts represent investment in assets of continuing value. Whether investment accounts reflect such investment presents wholly different questions from the questions involved in whether such accounts reflect actual legitimate original cost. Consequently, Petitioner insists that it has had no hearing on issues necessary to be determined before Petitioner can be lawfully ordered to eliminate the amounts from its investment accounts.

That amounts other than actual legitimate original cost may be lawfully retained in asset accounts is evident from the decision of this Court in the case of *American Telephone & Telegraph Co.* v. *United States*, 299 U. S. 232, 240-241, 81 L. Ed. 142, 149-150. That elimination of such amounts

---

[3] Section 301(a) of the Federal Power Act [16 U. S. C. A. 825(a)] upon which Respondent bases its accounting authority, provides in part as follows:

> "The Commission *after notice and opportunity for hearing may determine by order the accounts in which particular outlays and receipts shall be entered, charged or credited.*"

Such section also provides in part as follows:

> "(b) The Commission, before prescribing any rules or requirements as to accounts, records, or memoranda, or as to depreciation rates, shall notify each State commission having jurisdiction with respect to any public utility involved, and shall give reasonable opportunity to each such commission to present its views, and shall receive and consider such views and recommendations. June 10, 1920, c. 285, § 302, added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 855."

The record is devoid of any notice to the Alabama Public Service Commission that Respondent proposed the action here challenged.

as do not represent "original cost" but do represent investment in assets of continuing value would raise serious constitutional questions is also clear from that decision. The court in that case, in commenting on account 100.4, which corresponds to 100.5 in the Uniform System of Accounts which is prescribed for Petitioner and in which account is entered amounts representing the difference between original and present cost, said:

> "* * * The Commission is not under a duty to write off the whole or any part of the balance in 100.4 if the difference between original and present cost is a true increment of value. On the contrary, only such amount will be written off as appears upon an application for appropriate directions to be a fictitious or paper increment. * * *" (p. 240.)

On the request of the court, the Assistant Attorney General stipulated:

> "* * * that amounts included in Account 100.4 that are deemed, after a fair consideration of all the circumstances to represent an investment which the accounting company has made in assets of continuing value will be retained in that account until such assets cease to exist or are retired; and in accordance with paragraph (C) of Account 100.4 provision will be made for their amortization." (p. 241.)

The court then added:

> "* * * The administrative construction now affixed to the contested order devitalizes the objection that the difference between present value and original cost is withdrawn from recognition as a legitimate investment. (pp. 241-242.)
>
> "* * * By being included in the adjustment account, it is classified as provisionally a true investment, subject to be taken out of that account and given a different character if investigation by the Commission shows it to be deserving of that treatment. * * *

> What disposition of their content may afterwards be suitable upon discovery that particular items have been carried at an excessive figure must depend upon evidentiary circumstances, difficult to define or catalogue in advance of the event. * * *'' (p. 242).

The question which the Supreme Court was not called upon to settle in the above case because of the concession of the Attorney General is now squarely raised by the order, review of which is now sought.

Petitioner in its motion for a stay order pointed out to the court below that the investment accounts of Petitioner reflect a consideration paid in a consolidation in 1927 by Petitioner, a new corporation formed at that time, for varied licensed and unlicensed public utility properties of the three corporations involved, of which one was the owner of this licensed project (R. Vol. II, p. 859), and Petitioner maintains that the consideration so paid must be taken into consideration before determining whether its investment accounts are overstated.

The holding of the court below (R. Vol. II, p. 877) that the disposition ordered by the Commission was an issue in the hearings before the Commission is apparently based upon a failure to give effect to the distinction between project accounts reflecting actual legitimate original cost and the general investment accounts of Petitioner.[4]

---

[4] That entire elimination of the amounts in question from the investment accounts of Petitioner was not considered to be an issue by the Commission in the first hearing is clearly shown by the fact that no such elimination was required by the Commission's first order (R. Vol. I, p. 15). The notice of the second hearing (R. Vol. I, p. 616) does not indicate any change in the Commission's proposal in this regard.

The statement in the court's opinion (R. Vol. II, p. 889) that Petitioner had been unable to suggest any alternative to the accounting disposition ordered by the Commission is in error [see application for rehearing (R. Vol. II, p. 906-7)].

Under these circumstances, Petitioner maintains that it is clear that the Commission has not met the standards required by the decisions of this court[5]:

> "* * * The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command." *Morgan* v. *United States*, 304 U. S. 1, 18-19, 82 L. Ed. 1129.

Petitioner has heretofore attempted to demonstrate that no issue with respect to the amounts contained in its general investment accounts was involved in the present proceeding, nor was any hearing granted Petitioner on such issue. Even had there been such an issue and hearing, the order requiring a reduction in the stated investment of Petitioner in its utility properties as a whole would not be valid in the absence of a finding that the amounts carried in Petitioner's general investment accounts exceeded Petitioner's true investment in assets of continuing value. The record in this case is devoid of any such finding by the Commission and the order complained of is, therefore, invalid. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 431-433, 79 L. Ed. 446; *Mahler* v. *Eby*, 264 U. S. 32, 44-45, 68 L. Ed. 549; *Wichita R. R. Co.* v. *Public Utilities Commission*, 260 U. S. 48, 58-59, 67 L. Ed. 124.

---

[5] See also *Interstate Commerce Commission* v. *L. & N. R. R. Co.*, 227 U. S. 88, 57 L. Ed. 431; *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 292, 81 L. Ed. 1093; *Shields* v. *Utah-Idaho Ry. Co.*, 305 U. S. 177, 83 L. Ed. 111.

II.

Respondent exceeded its jurisdiction in requiring charge of disallowed items to petitioner's earned surplus account.

Section 201 of the Federal Power Act reads in part as follows:

> "Section 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, *such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.*" (Emphasis supplied.)[6]

Respondent has no jurisdiction over intrastate rates [16 U. S. C. A. 824(b)]. It has no jurisdiction over the issuance of Petitioner's securities [16 U. S. C. A. 824(c) f)]. The Commission has no jurisdiction over generation facilities (other than licensed projects) or intrastate distribution facilities except for very limited purposes [16 U. S. C. A. 824(b)].

It is the position of Petitioner that Respondent has no jurisdiction over Petitioner's general accounts to such an extent that it may, as it has done in the order here involved, require Petitioner to eliminate from its accounts capitalization of assets lawfully made under the laws of the State of Alabama nearly twenty-nine years ago. Such an order

---

[6] Petitioner was expressly relieved by its license from maintaining a system of accounts prescribed by the Federal Power Commission so long as its accounts remained regulated by state authority (R. Vol. I, p. 76).

is in derogation of the laws of the state regulating capitalization of utilities,[7] the rights and obligations of Petitioner and its stockholders and the general jurisdiction of the Alabama Public Service Commission over the accounts of Petitioner.[8] Such order also tends to affect the rights of Petitioner and the issuance of its securities over which the Respondent has no jurisdiction, contrary to the express policy of the Federal Power Act.

The present construction of the Federal Water Power Act by Respondent as permitting regulation by it of matters which are subject to state regulation is contrary to the statements of the purpose of such act by its advocates and sponsors in Congress, as appears from the following excerpts from the testimony of witnesses in the hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, Seventy-Fourth Congress, First Session, on H. R. 5423, Part I:

> "Mr. Merritt: Returning for a moment to Section 209—
>
> "Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the rules, regulations, practices, facilities, or service—
>
> "And so forth.
>
> "That does not say anything about interstate commerce; *but is that inferred?*
>
> "Commissioner Seavey: *Yes; the jurisdiction only goes to interstate* and if there is any doubt about that, language should be put in there; but it is believed that covers it (Hearings, p. 410).
>
> "The Chairman: Then, could there be any good reason why there should not be some authority that would control that the States cannot control?

---

[7] Alabama Code 1940, Title 10, Section 26; *Elyton Land Co.* v. *Birmingham Warehouse & Elevator Co.*, 92 Ala. 407, 425 (9 So. 129, 135), and *State, ex rel. White* v. *Citizens Light & Power Co.*, 172 Ala. 232, 236 (55 So. 193, 194).

[8] Ala. Code 1940, Title 48, Sections 41-46, 302-322.

"Commissioner Seavey: I do not know of any reason why.

"The Chairman: And is not that what you are talking about?

"Commissioner Seavey: That is what I am talking about.

"The Chairman: *And that you are driving at here by this law, whatever the language, to control that part of this business that the States themselves cannot control and that the States themselves would not control, in order that it might help them control the things that are in their States?*

"Commissioner Seavey: That is true.

"The Chairman: And that is what you are offering here as an amendment to the present law.

"Commissioner Seavey: Yes. (Hearings, p. 427.)

• • • • • • •

"Mr. Bulwinkle: The reason I asked, Mr. DeVane, I notice in the papers that the Georgia Utilities Commission announced that they were coming to Washington to fight this bill.

"Mr. Chairman: Yes; on the theory that it was taking away from them some of their jurisdiction; not on any other theory, because I think I have talked with practically every Congressman from Georgia or every one of them has talked to me about it, and upon being assured that this bill did not take jurisdiction away from their commission, they seemed to be perfectly satisfied.

"Mr. DeVane: Due to the error that occurred in subsection 201(a) there was plenty of justification for the effort that has been made to convince State commissions that it was the purpose of this bill to take power away from them, and that representation could be fairly made to them, and since the bill has been introduced, I have heard it stated that was the concealed purpose of this commission, and probably might be the intention of Congress; but I want to make it perfectly clear here that it is not the purpose or de-

sire of the Commission, and we trust that when the legislation comes out of Congress that it will leave to the State commissions as much authority as can be left with them.

"The Chairman: And you want the act to be perfectly clear on that point.

"Mr. DeVane: I want the act to be perfectly clear on that point." (Hearings, p. 529.)

The congressional intent not to encroach upon the field of regulation reserved to the states is further shown by the following statement from the report of the Senate Committee on Interstate Commerce as a result of its hearings on the legislation in question (S. 2796):

"'Section 201—Subsection (a) contains a declaration of the necessity for Federal regulation and defines the scope of that regulation. * * * It also declares the policy of Congress to extend that regulation to those matters which cannot be regulated by the States and to assist the States in the exercise of their regulatory powers, but not to impair or diminish the powers of any State commission.'" (Report No. 621, 74th Congress, 1st Session, p. 48.)

It is respectfully submitted that the foregoing petition for writ of certiorari should be granted.

H. C. KILPATRICK,
P. W. TURNER,
WALTER BOULDIN,
W. M. MOLONEY,
Attorneys for Petitioner.

MARTIN, TURNER & MCWHORTER,
600 North 18th Street,
Birmingham, Alabama,
Of Counsel.